

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the matter of)	
)	
Modifying the Commission's Process)	
to Avert Harm to U.S. Competition)	IB Docket No. 05-254
and U.S. Customers Caused by)	
Anticompetitive Conduct)	
)	

**COMMENTS OF
CABLE & WIRELESS JAMAICA LIMITED**

Camille Facey
Company Secretary and
Senior Vice President
Legal, Regulatory and Public Policy
CABLE & WIRELESS JAMAICA LIMITED
2-6 Carlton Crescent
Kingston 10
Jamaica, W.I.
(876) 936-2498

Robert J. Aamoth
Randall W. Sifers
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600
Counsel to
Cable & Wireless Jamaica Limited

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SUMMARY

Cable & Wireless Jamaica Ltd. (“C&WJ”) appreciates the Commission’s objective of protecting U.S. customers from harm resulting from anticompetitive “whipsawing” conduct by foreign carriers against U.S. carriers. However, it would be premature and unsupported for the Commission to intervene to address any issues that may have arisen, or may arise in the future, between the U.S. and Jamaica in connection with a *Ministerial Order* that requires Jamaican domestic carriers to collect a surcharge on incoming international traffic to fund the implementation of a newly-established universal service program.

In this case, it is clear that (i) the Jamaican Government expressly imposed this surcharge; (ii) the Jamaican Government required that the surcharge be applied to international incoming minutes; and (iii) the dispute with the U.S. carriers arose only when the Jamaican domestic carriers moved to implement the *Ministerial Order* and the U.S. carriers declined to agree to pay the surcharge. The Jamaican Government did not take any actions to directly or indirectly protect or strengthen the Jamaican domestic carriers in their business relations with U.S. carriers. Hence, the situation in Jamaica did not involve any effort by the Jamaican carriers to “whipsaw” U.S. carriers or otherwise to force U.S. carriers to accept settlement rate increases against their will. Moreover, C&WJ does not profit from the surcharge, and in fact, has lost, and continues to lose, substantial monies due to the surcharge. C&WJ submits that the Commission has no basis for concern about possible “whipsawing” conduct when the rate increase in question actually causes foreign carriers to lose money.

Regarding the specific issues on which the *Notice of Inquiry* seeks comment —

- C&WJ does not believe that it would be appropriate for the U.S. to impose surcharges on a route-by-route basis in response to surcharges imposed at the foreign end. Such surcharges would appear to be retaliatory in nature rather than legitimate efforts to promote universal service or other lawful policy objectives in the United States.

- C&WJ believes that in cases where a foreign government imposes a universal service surcharge, and U.S. or other originating overseas carriers refuse to accede to the surcharge, suspension of service and/or termination may be deemed appropriate until the parties can resolve the issue. It is not fair or appropriate to take the position that the foreign carriers should continue to terminate traffic for U.S. carriers when there is no agreement with the U.S. carriers about compliance with a government mandated universal service surcharge.
- C&WJ urges the Commission to ensure that foreign carriers have a meaningful opportunity to participate in any Commission proceedings, taking into account the longer lead times that foreign carriers may require to learn about Commission proceedings and to arrange for fully-informed participation.
- C&WJ urges the Commission to take a hard look at its existing benchmarks policy to determine the extent to which U.S. carriers have passed-through termination cost reductions to all classes of U.S. callers in the form of lower calling rates to Jamaica.

In C&WJ's view, the Jamaican Government's decision to establish the surcharge does not create a sufficient basis for any rulemaking or enforcement actions by the Commission, nor does it constitute or pose any risk of anticompetitive actions by foreign carriers. If the Commission believes that any country has taken actions in violation of its WTO commitments or other international treaty obligations, then the U.S. Government should raise those concerns in direct discussions between the two countries and, if necessary, by invoking multilateral dispute resolution mechanisms. Should the Commission nonetheless believe that actions may be necessary and appropriate, such actions should not have the direct or indirect result of penalizing Jamaican domestic carriers for taking actions consistent with the mandates of the Jamaican Government.

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COMMENTS

Cable & Wireless Jamaica Limited ("C&WJ"),¹ by its counsel, hereby submits these comments in response to the Commission's *Notice of Inquiry* ("NOI") in the above-captioned docket.² C&WJ's comments generally are limited to addressing issues identified in the *NOI* that relate to recent developments in Jamaica.

C&WJ appreciates the Commission's objective of protecting U.S. customers from harm resulting from anticompetitive "whipsawing" conduct by foreign carriers against U.S. carriers. However, C&WJ submits that it would be premature and unsupported for the Commission to intervene, either through the commencement of a generic rulemaking proceeding or otherwise, to address any issues that may have arisen, or may arise in the future, between the U.S. and Jamaica regarding the implementation of a universal service surcharge mandated by the Government of Jamaica. In C&WJ's view, the Jamaican Government's decision to establish the surcharge does

¹ Cable and Wireless Jamaica Limited ("C&WJ") provides domestic and international telecommunications services in Jamaica. C&WJ is an 82% subsidiary of Cable & Wireless plc. The other 18% is owned by the general public.

² Modifying the Commission's Process To Avert Harm to U.S. Competition and U.S. Customers Caused by Anticompetitive Conduct, IB Docket No. 05-254, *Notice Of Inquiry*, FCC 05-152 (released Aug. 15, 2005) ("NOI").

not create a sufficient basis for any actions by the Commission, nor does it constitute or pose any risk of anticompetitive actions by foreign carriers. To the extent that the Commission believes that Commission actions may be necessary and appropriate, such actions should not have the direct or indirect result of penalizing Jamaican domestic carriers for taking actions consistent with the mandates of the Jamaican Government. If the Commission believes that any country has taken actions in violation of its WTO commitments, then the United States Government should raise those concerns in direct discussions between the two countries and, if necessary, invoke the appropriate WTO dispute resolution mechanisms.

I. THE REQUEST FOR AN INCREASED RATE WAS SOLELY TO IMPLEMENT THE UNIVERSAL SERVICE SURCHARGE MANDATED BY THE JAMAICAN GOVERNMENT

In April of this year, the Jamaican Ministry of Commerce, Science & Technology issued an order mandating that, beginning June 1, 2005, Jamaican domestic carriers collect a surcharge on all incoming international calls for the purpose of funding the implementation of a newly-established universal service program.³ The surcharge amount, which is in addition to contracted termination rates,⁴ is \$0.03 per minute on all incoming international calls terminating on fixed wire networks and \$0.02 per minute on all incoming international calls terminating on mobile networks.⁵

In early April 2005, immediately after being informed by the Ministry of the surcharge, C&WJ notified not only each applicable U.S. carrier but all other foreign carriers that the Ministry would be issuing an order mandating that C&WJ collect a surcharge on all incoming

³ See *Ministerial Order* (issued Apr. 19, 2005) (“*Ministerial Order*”) and *Annex to Ministerial Order* (issued May 31, 2005) (“*Annex*”) (attached hereto as Exhibit 1).

⁴ See *Ministerial Order* at ordering clause 5. (“Where rates are required to be cost-based, the levy shall be in addition to those rates”).

⁵ See *Ministerial Order* at ordering clauses 1 & 2.

international calls and that, beginning June 1, 2005, the existing termination rates would be increased by the surcharge amount.⁶ C&WJ provided each U.S. carrier with a copy of the *Ministerial Order* and asked each overseas carrier to sign and return a copy of the notification letter to confirm acceptance of the change in rates. Certain carriers subsequently informed C&WJ orally and in writing that they would not agree to pay the surcharge. On June 1, 2005, C&WJ was forced to block circuits to five U.S. carriers who had informed C&WJ that they would not comply with the Government mandate to pay the surcharge. The U.S. carriers subsequently agreed to pay the surcharges and most had service restored to Jamaica within a few days.⁷ No suspension of service has since occurred. To date, no carrier has terminated relations with C&WJ as a result of the surcharge or the circuit blocking. All U.S. carriers have made payment for traffic since June, inclusive of the surcharge.

The *NOI* suggests that the circuit blocking in Jamaica may have been done with the implicit support of the government as a deliberate tactic to exert leverage over commercial negotiations for the purpose of forcing U.S. carriers to accede to the rate demands of Jamaican domestic carriers, including C&WJ.⁸ C&WJ respectfully submits that this suggestion is an inaccurate portrayal of the situation in Jamaica. While it may be difficult in some cases to determine whether foreign carriers are acting of their own volition or pursuant to a mandate by their government, the situation in Jamaica is not one of those cases.

In particular, the situation in Jamaica is *not* one where the Jamaican domestic carriers had been seeking to increase the settlement rate for international calls nor one in which the Jamaican

⁶ It would be incorrect to characterize the requested rate increase on the U.S.-Jamaica route as an increase in the “settlement” or “termination” rate. Given that the Jamaican carriers must hand over the surcharge in its entirety to the Jamaican government, it is more accurately viewed as a Government-imposed surcharge or tax.

⁷ Circuits were blocked from June 1 to as long as June 8 for certain carriers.

⁸ *NOI* ¶¶ 4-5.

government adopted a rule for the purpose of endorsing and supporting the bargaining position of the Jamaican carriers in settlement rate negotiations with U.S. carriers. At the time the Jamaican Government adopted the surcharge, there were no settlement rate disputes between U.S. and Jamaican carriers. What occurred was that the Jamaican Government exercised its sovereign right to require Jamaican domestic carriers to collect a surcharge on incoming international traffic to fund the implementation of a newly-established universal service program. C&WJ was bound by the law and its license to implement the Government imposed surcharge. No dispute occurred until the U.S. carriers declined to agree to pay the surcharge, thereby forcing C&WJ and other Jamaican carriers to cease terminating incoming international calls from those carriers. The Jamaican Government did not take any actions to directly or indirectly “protect” or “strengthen” the Jamaican domestic carriers. Hence, the situation in Jamaica is not accurately described as an effort by the foreign carriers to “whipsaw” U.S. carriers or otherwise to force U.S. carriers to accept settlement rate increases against their will.⁹

A. The Ministerial Order Is Very Clear that Jamaican Domestic Carriers Were Required to Collect the Surcharge on International Incoming Minutes Received From All Overseas Carriers

The *Ministerial Order* clearly states how the Jamaican domestic carriers must collect the surcharge:

The levy will be added to the [] contracted termination rates for international inbound calls payable by third parties to the Domestic Network Operators (“Terminating Carriers”) and will be collected by those Terminating Carriers in accordance with the billing and payment terms of the prevailing interconnection or other agreements between the respective parties. Where rates are required to be cost-based, the levy shall be in addition to those rates.¹⁰

⁹ There was never any negotiation between U.S. and Jamaican carriers about the amount of the increase. The only question was whether U.S. carriers would agree to pay the specific surcharge mandated by the Jamaican Government.

¹⁰ See *Ministerial Order* at ordering clause 5.

This is not a case where foreign carriers, of their own volition, sought to increase termination rates on the U.S.-Jamaica route. In this case, it is clear that the Jamaican Government expressly imposed this surcharge on the international incoming service and required that the surcharge be collected by the Jamaican carriers from the originating overseas carriers. Disputes with the U.S. carriers arose only when the Jamaican domestic carriers moved to implement the surcharge mandated by the Jamaican Government.

B. C&WJ is Required Both by Law and Its License to Implement the Ministerial Order Imposing the Universal Service Surcharge

C&WJ is required both by law and its license to implement the *Ministerial Order*, which requires Jamaican domestic carriers to collect from originating overseas carriers a specified surcharge on all incoming international calls for the purpose of funding a newly-established universal service program. The *Ministerial Order* makes clear that if the Jamaican carriers failed to implement the order this would be in violation of both the law and the terms of their licenses:

Licensees are required to pay the levy in accordance with the terms of their Licence, and pursuant to section 38(d) of the Telecommunications Act 2000. The manner of payment will be as prescribed above and failure to make the requisite Universal Service Contributions shall be deemed to be a breach of the Licences issued under the Telecommunications Act 2000.¹¹

C. The Ministerial Order Contemplated Circuit Blocking in Cases Where the Surcharge Was Not Being Paid By The Originating Carrier

Given the clarity of the *Ministerial Order* and the Minister's forewarning, it should not have surprised any U.S. carrier that circuits would be blocked if they refused to pay the surcharge. In fact, all U.S. carriers had advance fair warning that suspension of the termination

¹¹ See *Ministerial Order* at ordering clause 10; Section 38(d) of Jamaica's Telecommunications Act (2000) provides that "licensees shall pay the universal service levy in the prescribed manner." See also *Annex 202* at term 4 ("Failure by any Licensee to make the requisite Universal Service Contributions shall be deemed to be a breach of the Licences issued under the Telecommunications Act, 2000").

of international traffic would be appropriate in circumstances where a lawful surcharge was not paid. First, the *Ministerial Order* contemplated that suspension of the termination of international traffic would be appropriate in cases where the originating foreign carrier declined to pay the surcharge, stating that:

In the event that any party fails to pay a Terminating Carrier the necessary levy, the Terminating Carrier shall be entitled to suspend the provision of termination services in accordance with the approved procedure.¹²

Second, in his response to a letter from certain U.S. carriers objecting to the surcharge, the Minister forewarned the U.S. carriers that the Jamaican providers would be forced to block circuits if the U.S. carriers refused to pay the surcharge. The Minister stated that:

Please bear in mind that any carrier who fails to comply with the Order is subject to suspension or termination of their licence, and the carriers are required to file reports with the regulator that will likely enable us to respond expeditiously to allegations of breach or non-compliance. **It is therefore likely that carriers who fail to secure rate changes before June 1, 2005 will block the international circuits in order to ensure that their licences are not placed at risk.**¹³

Moreover, in his letter to C&WJ regarding the surcharge, the Minister reminded C&WJ that it was obligated to comply with the *Ministerial Order* and failure to do so would subject it to suspension or termination of its license.¹⁴

¹² *Ministerial Order* at ordering clause 8. C&WJ provided each U.S. carrier with a copy of the *Ministerial Order* soon after its release.

¹³ Letter to Mary Hoberman, Director, International Public Policy, AT&T Wireless, from Phillip Paulwell, Minister, Ministry of Commerce, Science and Technology, Jamaica at 4 (May 24, 2005) (emphasis added) (attached hereto as Exhibit 2).

¹⁴ Letter to Camille Facey, Cable and Wireless Jamaica Ltd., from Phillip Paulwell, Minister, Ministry of Commerce, Science and Technology, Jamaica at 4 (June 1, 2005) (attached hereto as Exhibit 3).

D. C&WJ Does Not Profit From the Surcharge

The Commission should be aware that C&WJ does not profit from the surcharge. C&WJ effectively acts as a collection agent for the Ministry. Whatever has been collected from the carriers is paid to the universal service fund. In fact, C&WJ has lost, and continues to lose, a substantial amount of money due to the surcharge. C&WJ does not recover its administrative expenses of implementing the surcharge, and C&WJ is not in a position to “mark up” the surcharge to obtain compensation for those costs – changes to the surcharge can only be made by the Government.¹⁵ C&WJ also loses money each month because the higher rates resulting from the surcharge have resulted in less traffic, due both to an increase in unlawful bypass and possibly a reduction in demand caused by the pass-through of the increase in payment for terminating calls to customers originating calls. C&WJ has also suffered a significant loss of revenues from the traffic that normally would have been terminated during the period when circuits were blocked. As a general matter, C&WJ submits that the Commission has no basis for concern about possible “whipsawing” conduct when the rate increase in question actually causes foreign carriers to lose money.

E. The Universal Service Surcharge Will, In Fact, Be Used in Jamaica to Promote Universal Service

The universal service fund will be used to finance the establishment and promotion of Internet access throughout the country in schools, public libraries and post offices. The program is designed to significantly increase the Jamaican population’s access to data services and the Internet with an overall goal of helping to eradicate inequality within the education system.¹⁶

¹⁵ Section 39(5) of Jamaica’s Telecommunications Act (2000) provides for the imposition of a universal service charge for the establishment of a universal service fund.

¹⁶ See Black Britain, “Jamaica’s Incoming International Calls to be Charged,” *available at*: <http://www.blackbritain.co.uk/news/details.aspx?i=1481&c=caribbean&h=Jamaica's+incoming+international+calls+to+be+charged>

In accordance with the *Ministerial Order*, the Jamaican Government created a special purpose company called the Universal Service Fund Company (the “Fund”) to collect, manage, and disburse funds. The Fund’s Board of Directors is chaired by the Chairman of the Spectrum Management Authority (SMA).¹⁷ Board Vice President is the Ministry’s Permanent Secretary. Other members of the Fund’s Board include the chair of SMA’s Company finance committee, a local attorney, a representative of the Ministry of Finance and Planning, and two representatives jointly nominated by Jamaica’s domestic network operators.¹⁸ The statutory provisions governing universal service and the Fund’s organizational structure are designed to provide the Fund and the Ministry with sufficient oversight to ensure that the funds collected are used in the best interests of the Jamaican people.

II. IT WOULD BE PREMATURE AND UNSUPPORTED FOR THE COMMISSION TO INTERVENE TO ADDRESS ISSUES BETWEEN THE U.S. AND JAMAICA REGARDING THE IMPLEMENTATION OF THE UNIVERSAL SERVICE SURCHARGE

C&WJ appreciates the Commission’s desire to study what procedures and mechanisms might be available to the Commission in cases where foreign carriers act in anticompetitive ways, either by whipsawing or otherwise, to the detriment of U.S. consumers. In C&WJ’s view, the Jamaican Government’s decision to establish the surcharge does not create any risk of anticompetitive actions by foreign carriers.

A. Rate Increases Mandated by Foreign Governments Should Not be Deemed Anticompetitive

It is critical that the Commission not place into this category situations where the increase in rates is mandated by the foreign government. In cases where a foreign carrier is complying

¹⁷ Government of Jamaica, Ministry of Commerce, Science and Technology, “Government Imposes Levy on Incoming International Calls,” *available at*: http://www.mct.gov.jm/call_levy.htm.

¹⁸ *Id.*

with a law, rule or order of its own government, there is no anticompetitive whipsawing or other conduct occurring. Once a foreign government has prescribed or otherwise required a rate increase, that should remove the situation from the category of “whipsawing” actions. Any concerns that the U.S. Government may have about the validity or wisdom of the rate increase should be taken up directly with the foreign government involved or through multilateral institutions.

B. The Commission Must Not Adopt A “Shoot First and Ask Questions Later” Approach

The *NOI* seeks feedback on the length of the pleading cycle associated with an action the Commission might take in response to alleged anticompetitive conduct by foreign carriers.¹⁹ C&WJ is concerned that severely reducing the pleading cycle would effectively deprive foreign carriers and governments of their ability to participate or tell their side of the story. The Jamaican situation should prove that if these Commission proceedings become the equivalent of *ex parte* actions at the behest of U.S. carriers, the Commission may be persuaded to take actions based on a flawed portrayal of what has occurred in the foreign country. Hence, C&WJ urges the Commission to continue to act within reasonable standards of natural justice when addressing issues in this area. At a minimum, C&WJ urges the Commission to make sure that foreign carriers have a meaningful opportunity to participate in any Commission proceedings, taking into account the longer lead times that foreign carriers may require to learn about Commission proceedings and to arrange for fully-informed participation.

¹⁹ *NOI* ¶ 9.

III. EVERY COUNTRY HAS THE SOVEREIGN RIGHT TO ADOPT LAWS AND RULES TO PROMOTE UNIVERSAL SERVICE

In every case where a foreign country adopts a law, rule or order requiring a rate increase, then the Commission and the U.S. carriers should respect that rate increase. This is true even if the U.S. Government believes that the rate increase violates the WTO Agreement or other treaty obligations.

A. If the Commission Believes that Any Country has Adopted a Universal Service Surcharge in Violation of its WTO Commitments, the Appropriate Place to Raise That Concern is in Direct Discussions Between the Two Countries or Through WTO Enforcement Mechanisms

In C&WJ's view, if the Commission believes that any country has adopted a rate increase in violation of its WTO commitments, the appropriate place to raise that concern is in direct discussions between the two countries, and, if necessary, by invoking WTO dispute resolution mechanisms. The WTO Reference Paper gives each country the ability to take actions to promote universal service.²⁰ If the U.S. Government takes issue with the universal service surcharge in Jamaica for whatever reason, it should raise its concerns directly with the Jamaican Government.²¹ In the event any such discussions are not fruitful, the remaining option available

²⁰ Section 3 of the WTO Reference Paper Annex to the Fourth Protocol to the GATS Agreement on Trade in Services states:

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

²¹ In analyzing whether this surcharge is discriminatory in violation of the WTO Reference Paper, C&WJ submits that, at a minimum, the local taxes imposed on domestic calls (but not international calls) in Jamaica must be taken into account. The Commission should not conclude that a surcharge imposed only on incoming international calls is facially discriminatory in violation of the WTO Agreement without conducting a fuller analysis of the contributions made by all types of traffic, both domestic and international, to the promotion of universal service objectives in the foreign country.

to the U.S. Government is the invocation of appropriate multilateral dispute resolution procedures.

C&WJ urges the Commission to exercise caution when taking actions that might conflict with foreign laws, rules or orders, or that would place the U.S. and foreign carriers in the untenable position of having to comply with inconsistent orders from different countries at the same time. As a preliminary matter, C&WJ is concerned that the Commission lacks the authority to subject foreign carriers to conflicting legal requirements.²² In the appeal of the *Benchmarks Order*, the U.S. Court of Appeals for the D.C. Circuit declined to confirm the Commission's authority to adopt benchmarks that conflict with the regulations or rate prescriptions of a foreign regulatory authority.²³ In any event, C&WJ would note that the Commission historically has sought to avoid the adoption of rules that conflict with the laws of foreign countries, and it submits that this practice is a sound policy in this situation as well.

B. It Would Not Be Appropriate for the U.S. to Increase U.S. Termination Rates by the Same Amount as the Universal Service Surcharge

The *NOI* asks whether it would be appropriate to order U.S. carriers to charge foreign carriers an amount equal to what they are being charged.²⁴ While the Commission has the same right as other regulators to impose surcharges on incoming international traffic to support universal service programs, C&WJ does not believe that it would be appropriate for the U.S. to

²² See, e.g., *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991) (the presumption that federal legislation applies only to the U.S. “protect[s] against unintended clashes between our laws and those of other nations which could result in international discord” quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)); see also *Smith v. United States*, 507 U.S. 197, 204 n.5 (1993) (the presumption that federal legislation applies only to the U.S. also stems from “the common-sense notion that Congress generally legislates with domestic concerns in mind”).

²³ See *Cable & Wireless plc v. FCC*, 166 F.3d 1224, 1230 (D.C. Cir. 1999) (“we see no need to decide” whether the Commission can adopt a benchmarks policy which “subjects foreign carriers to conflicting obligations”).

²⁴ *NOI* ¶ 13.

impose such surcharges on a route-by-route basis in response to surcharges imposed at the foreign end. Such surcharges would appear to be retaliatory in nature rather than legitimate efforts to promote universal service or other lawful policy objectives in the United States.

First, to the extent that the imposition of route-specific surcharges would lead to settlement rates that are not cost-based, such surcharges would be “unjust or unreasonable” in violation of Section 201 of the Communications Act. Second, any such action by the Commission would raise WTO concerns. Regulatory actions should be non-discriminatory and consistent with the principles of transparency and procedural fairness in the WTO Agreement and other international agreements. The imposition of a surcharge on the U.S.-Jamaica route in an amount equal to the surcharge imposed by the Jamaican Government – or indeed the adoption of any surcharge on the U.S.-Jamaica route designed to reduce the impact of the surcharge on U.S. carriers – would contravene U.S. commitments under the WTO Reference Paper, which the U.S. accepted without reservation. In particular, the Reference Paper requires Members to ensure that interconnection is provided at cost-oriented rates that are transparent, reasonable, and having regard to economic feasibility.

IV. IN CASES WHERE A FOREIGN GOVERNMENT IMPOSES A UNIVERSAL SERVICE SURCHARGE AND U.S. OR OTHER ORIGINATING OVERSEAS CARRIERS REFUSE TO ACCEDE TO THE SURCHARGE, SUSPENSION OF SERVICE AND/OR TERMINATION MAY BE DEEMED APPROPRIATE UNTIL THE PARTIES RESOLVE THE ISSUE

The *NOI* seeks comment on whether there are any instances in which circuit blockages are appropriate.²⁵ C&WJ would like to correct the record in this proceeding by noting that, contrary to certain language in the *NOI*, the Jamaican domestic carriers did not suspend termination of international traffic “as a negotiating tactic to obtain higher interconnection rates

²⁵ *NOI* ¶ 8.

from U.S. carriers.”²⁶ There were no “negotiations” in the commercial sense of that term for the simple reason that the Government mandated surcharge was not subject to negotiation. Rather, the question was whether the U.S. carriers would comply with the Jamaican Government’s decision or not. If not, then Jamaican carriers were obliged to protect themselves from the threat of revocation of their telecommunications licenses. The issue that was discussed between Jamaican carriers and overseas carriers, including the U.S. carriers, was whether they would comply with payment of the Government mandated surcharge on international calls. This was not a situation where the parties were in the middle of commercial rate negotiations. Rather, the Jamaican carriers were obliged to vary their contract terms and conditions in light of a change in the law. When the U.S. carriers indicated that they would not comply with the Government mandate to pay the surcharge, Jamaican carriers had no choice but to suspend the termination of international calls into Jamaica by blocking the circuits. It is not reasonable to expect the Jamaican carriers to continue terminating calls for the U.S. carriers in these circumstances when there was no assurance that the Jamaican carriers would ever receive payment of the surcharge on the traffic by the U.S. carriers.

C&WJ believes that in cases where a foreign government imposes a surcharge, and U.S. or other originating overseas carriers refuse to accede to the surcharge, it can reasonably be deemed appropriate for blocking to occur until the parties can resolve the issue. It is not fair or appropriate to take the position that the foreign carriers should continue to terminate traffic for U.S. carriers when there is no agreement with the U.S. carriers about compliance with a government mandated universal service surcharge.

²⁶ *NOI* ¶ 4.

A. In the *Benchmarks Order*, the Commission Imposed the Benchmarks Rules as a Direct Constraint on U.S. Carriers, Not On Foreign Carriers

In the *Benchmarks Order*, the Commission adopted rules prohibiting U.S. carriers from agreeing with a foreign correspondent to a settlement rate above the relevant benchmark.²⁷ The Commission determined that while the rules act as a direct constraint on U.S. carriers, they do not in any way constitute the exercise of jurisdiction over foreign carriers.²⁸ In arguments before the D.C. Circuit in the appeal of the *Benchmarks Order*, the Commission argued that if the benchmark limits were not acceptable to a foreign carrier, then the foreign carrier had the right to decline to accept telephone calls from the U.S. and be free of the Commission entirely.²⁹ C&WJ believes that a similar approach is instructive here. U.S. carriers are required to comply with the surcharge mandated by the Jamaican Government only if they choose to send traffic to Jamaica. If the Government mandated surcharge is not acceptable to a U.S. carrier, then the U.S. carrier can decline to send traffic to Jamaica and terminate its direct relations with the Jamaican domestic carriers. In situations where U.S. carriers decline to pay a surcharge mandated by a foreign government, there can be no expectation that foreign carriers will continue to terminate traffic for the U.S. carriers or to take responsibility for the surcharge that the foreign government has imposed on incoming international calls.

²⁷ International Settlement Rates, *Report and Order*, 12 FCC Rcd. 19806, 19935 (¶ 279) (1997) (“*Benchmarks Order*”).

²⁸ *Id.*

²⁹ *Cable & Wireless plc v. FCC*, No. 97-1612, Brief for Respondents at 27 (May 6, 1998).

V. DESPITE THE SIGNIFICANT SETTLEMENT RATE REDUCTIONS ON THE U.S.-JAMAICAN ROUTE, U.S. RETAIL RATES HAVE NOT DECREASED PROPORTIONATELY

Since 2000, settlement rates on the U.S.-Jamaica route have fallen from \$0.60 per minute to \$0.026 per minute in 2005, representing a 96% rate reduction.³⁰ In accordance with the goals of the Commission's benchmarks policy and in light of the drastic reduction in the settlement rate, U.S. calling rates to Jamaica should have decreased significantly. However, contrary to expectations, the drastic reduction in the settlement rate on the U.S.-Jamaica route has not resulted in proportionately lower calling rates for U.S. consumers. According to Commission data, the average billed revenue per minute for calls to Jamaica in 2000 was \$0.58.³¹ According to unofficial information, C&WJ believes that the current average billed revenue per minute for calls to Jamaica is in the range of \$0.22 today, representing a 62% rate reduction from 2000. Despite the 96% settlement rate reduction, retail calling rates on the U.S.-Jamaica route have declined only 62% with the benefit of the differential accruing to the U.S. carriers. This has harmed C&WJ as the higher U.S. retail rates have caused lower traffic volumes and reduced terminating revenues on the route.

The Commission made a commitment when it established the benchmarks policy that it would monitor the pricing behavior of U.S. international carriers and take appropriate actions if termination cost reductions were not being fully passed through on a route-by-route basis.³² C&WJ urges the Commission to take a hard look at its existing benchmarks policy to determine

³⁰ On January 1, 2001, the benchmark settlement rate of \$0.19 per minute became effective for calls to Jamaica. Jamaica was granted authority for International Simple Resale (ISR) in 2001.

³¹ Federal Communications Commission, International Bureau Report: *Trends in International Telecommunications Industry* (September 2005) at Table 9.

³² *Benchmarks Order*, 12 FCC Rcd. at 19931 (¶ 272).

the extent to which U.S. carriers have passed-through termination cost reductions to all classes of U.S. callers in the form of lower calling rates to Jamaica.

VI. CONCLUSION

For the reasons discussed above, C&WJ submits that the actions taken by the Jamaican carriers should not be categorized as whipsawing and that due consideration be given to foreign carriers' obligations to observe and obey local laws, regulations and policies. Accordingly, C&WJ urges the Commission to avoid mandating or recommending any action that would result in penalizing foreign carriers for taking actions consistent with the laws, rules and policies adopted by their respective governments.

Respectfully submitted,

KELLEY DRYE & WARREN LLP

/s/

Camille Facey
Company Secretary and
Senior Vice President
Legal, Regulatory and Public Policy
CABLE & WIRELESS JAMAICA LIMITED
2-6 Carlton Crescent
Kingston 10
Jamaica, W.I.
(876) 936-2498

Robert J. Aamoth
Randall W. Sifers
KELLEY DRYE & WARREN LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036
(202) 955-9600
Counsel to
Cable & Wireless Jamaica Limited

October 7, 2005

CERTIFICATE OF SERVICE

I, Beatriz Viera-Zaloom, hereby certify that I have served a copy of the foregoing **Comments of Cable & Wireless Jamaica Limited** on this 7th day of October 2005, upon the following parties by email:

Emily Willeford
Legal Advisor to Chairman Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Emily.Willeford@fcc.gov

John Branscome
Acting Legal Advisor to Commissioner
Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
John.Branscome@fcc.gov

John Giusti
Acting Legal Advisor to Commissioner Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
John.Giusti@fcc.gov

Barry Ohlson
Senior Legal Advisor to Commissioner
Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Barry.Ohlson@fcc.gov

Anna Gomez
Deputy Chief, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Anna.Gomez@fcc.gov

Brad Lerner
Legal Advisor, Office of Bureau Chief
International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Brad.Lerner@fcc.gov

David Strickland
Assistant Division Chief
Policy Division, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
David.Strickland@fcc.gov

Francis Gutierrez
Attorney Advisor
Policy Division, International Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554
Francis.Gutierrez@fcc.gov

/s/

Beatriz Viera-Zaloom

EXHIBIT 1

MINISTERIAL ORDER

(Issued by the Minister of Commerce, Science & Technology pursuant to Sections 38 & 39 of the Telecommunications Act 2000)

WHEREAS pursuant to section 11(1) of the Telecommunications Act 2000 ("the Act") all Telecommunications Licences granted by the Minister are subject to an undertaking by the Licence to "... comply with the provisions of this Act relating to the type of facility or specified service to which the [licence] relates including...universal service obligations..."

AND WHEREAS pursuant to section 38(d) of the Act the provision of universal service must accord with certain express principles including the requirement that "...licences shall pay the universal service levy in the prescribed manner."

AND WHEREAS by Recommendation Document No: TEL. 2004/07 the Office of Utilities Regulation ("OUR") made its recommendations to the Minister in accordance with the duties imposed on the OUR by the provisions of sections 4(1)(g) and 39 of the Act; in response to which recommendation the Minister applied the principle set out in section 39(2)(d) of the Act to determine the basis for the provision of universal service; and imposed a levy for the purpose of funding the provision of the universal service so determined.

AND WHEREAS having further considered the matter and the overall state of the industry, particularly noting the internationally recognized right of sovereign Governments to define and require surcharges for meeting the Country's universal service requirements, separate from cost-oriented rates; and considering further the cost already borne by the industry for the on-going provision of universal service by the domestic network operators;

IT IS HEREBY ORDERED AS FOLLOWS:

1. With effect from June 1, 2005 all carriers will contribute, on collection, a Universal Service Charge of US\$0.03 per minute on all incoming international minutes for termination to the PSTN.
2. With effect from June 1, 2005 all Carriers will contribute, on collection, a Universal Service Charge of US\$0.02 per minute on all incoming international minutes for the termination to the PLMN.
3. Payment of the Universal Service contribution levied in paragraphs (1)(2) above shall fulfill the statutory and licence requirements for contribution to the Universal Service Fund.
4. The Universal Service contributions ("the levy") will be used to fund the implementation of the Cabinet approved plan which will include the e-Learning Project in the first instance, in accordance with the principle set out in section 39(2)(d) of the Act relating to the provision of Internet access for

Schools, Libraries and Post Offices, and in accordance with the Universal Service obligations determined by the Minister pursuant to the powers conferred by section 39(1) of the Act.

5. The levy will be added to the OUR approved and/or contracted termination rates for international inbound calls payable by third parties to the Domestic Network operations (Terminating Carriers") and will be collected by those Terminating Carriers in accordance with the billing and payment terms of the prevailing interconnection or other agreements between the respective parties. Where rates are required to be cost-based, the levy shall be in addition to those rates.
6. Carriers will continue to provide their traffic reports, and any other information requested, to the OUR in order to validate the calculation of the levy in respect of their own traffic, and of traffic terminated on other networks by third parties.
7. The levy will be due and payable in accordance with the Carrier's monthly billing and payment cycles. Liability for payment of the levy is personal to each licensee and failure to pay over sums collected pursuant hereto will constitute a breach of the Licence and of the Telecommunications Act 2000. Terminating Carriers interconnecting with other International Carriers will not be liable for the contributions charged to their interconnect customers, and accordingly the levy shall not be included in the calculation of security deposits, guarantees, or other mechanisms for insuring those carriers against loss arising from non-payment of invoiced charges by their customers.
8. In the event that any party fails to pay a Terminating Carrier the necessary levy, the Terminating Carrier shall be entitled to suspend the provision of termination services in accordance with the approved procedure.
9. The administrative and operational framework shall be implemented on or before June 1, 2005 in accordance with the procedures which shall be agreed and documented and shall operate as an annex to this order. Subject to this framework being in place in accordance with the Telecommunications Act, carriers shall commence collection of the levy and make timely payments to the Universal Service Fund Collection Agency & Administrator, designated by the Minister in accordance with the approval of Cabinet.
10. Licensees are required to pay the levy in accordance with the terms of their Licence, and pursuant to section 38(d) of the Telecommunications Act 2000. The manner of payment will be as prescribed above and failure to make the requisite Universal Service Contributions shall be deemed to be a breach of the Licences issued under the Telecommunications Act 2000.

DATED THIS 19TH DAY OF APRIL, 2005



HON. PHILLIP PAULWELL
MINISTER OF COMMERCE, SCIENCE & TECHNOLOGY;
With Energy



THE
JAMAICA GAZETTE
SUPPLEMENT

PROCLAMATIONS, RULES AND REGULATIONS

201

Vol CXXVIII

TUESDAY, MAY 31, 2005

No. 39

No. 48

ANNEX TO MINISTERIAL ORDER

(ISSUED BY THE MINISTER OF COMMERCE, SCIENCE AND TECHNOLOGY PURSUANT TO
SECTIONS 38 AND 39 OF THE TELECOMMUNICATIONS ACT, 2000)

WHEREAS by Recommendation Document No: TEL. 2004/07 the Office of Utilities Regulation ("OUR") made its recommendations on universal service to the Minister in accordance with the duties imposed on the OUR by the provisions of sections 4 (1) (g) and 39 of the Act; in response to which recommendation the Minister applied the principle set out in section 39 (2) (d) of the Act to determine the basis for the provision of universal service; and imposed a levy for the purpose of funding the provision of the universal service obligation so determined.

WHEREAS the imposition of the said levy resulted in an Application for Reconsideration by three Domestic Network Operators, with expressions of support from various members of the Association of Competitive Carriers, which Application was heard by the Honourable Minister.

WHEREAS in the process of reconsidering his earlier decision, the Minister held further consultations with the OUR, the three Applicants, various other stakeholders and interested

parties, and representatives of the Association for Competitive Carriers; additionally, written and oral submissions were made by and on behalf of the Applicants.

AND WHEREAS, pursuant to the powers conferred by the Act, and recognizing the merits of the matters raised in the further submissions and consultations; and further recognizing the urgency of the need to bridge the digital divide through the implementation of the Cabinet approved Universal Service plan; the Minister and the three Applicants agreed to resolve the issues raised in the Application for Reconsideration on the terms set out in this Annex, and to continue the process of consultation and co-operation so as to ensure the efficient, transparent, and non-discriminatory administration of the universal service fund, and implementation of the universal service plan.

TERMS:

1. The within Order, ("the Order") effective June 1, 2005, by virtue of which the Universal Service Levy is imposed, together with this Annex, will be incorporated into and form the basis of the operating mandate for the administrator of the universal service fund.

2. The fund shall be administered by a wholly owned Government subsidiary under the management of the Spectrum Management Authority, and the administrative and operational framework shall be implemented on or before June 1, 2005. Subject to this framework being in place in accordance with the Telecommunications Act, carriers shall commence collection of the levy and make timely payments to the Universal Service Fund Collection Agency and Administrator.

3. The Board of Directors of the Fund Administrator shall include two representatives, jointly nominated by the Domestic Network Operators, and management of the affairs of the company shall be accomplished through the use of Board-appointed sub-committees. The membership of such sub-committees shall be open to representatives of the contributors of the Fund, in unlimited but reasonable numbers.

4. Failure by any Licensee to make the requisite Universal Service Contributions shall be deemed to be a breach of the Licences issued under the Telecommunications Act, 2000. As provided for in the Order, this Annex sets out the Approved Procedure for the suspension of termination services in the event of non-payment, or disputes regarding payment of the levy.

5. *Approved Procedure for Suspension of Termination Services in the event of disputes, and non-payment:* The Approved Procedure may be used by Terminating Carriers for the purpose of suspending termination services in the event of disputes as to the amount, or calculation of the levy. The terminating carrier shall notify the relevant carrier-in-default that the appropriate levy payment has not been paid in a given month ("Notification of Default"). If the carrier-in-default disagrees it will give written notice to the terminating carrier of the undisputed amount and make payment in respect of such amount within 24 hours of Notification of Default. If the carrier-in-default fails to make such undisputed payments the terminating carrier will be entitled to suspend termination services within 48 hours of delivery of the Notification of Default. The carrier's right to withhold payment of any portion of the levy due in respect of a given month shall be

limited to disputed amounts which equal or exceed five percent (5%) of the total levy due for that period pursuant to the following terms and conditions:

- (i) the traffic volumes and consequent amount in dispute must be asserted in good faith;
- (ii) the carrier-in-default and the terminating carrier must provide each other with a written statement of the disputed traffic volumes and times and the disputed amount of the levy within ten (10) days of receipt of the invoice for the month in respect of which the levy was due. Further supporting documentation must be provided by either party to the other on reasonable request within a further five (5) days;
- (iii) a dispute notification shall not relieve a carrier of its obligation to make levy payments due and owing within thirty (30) days of the end of the month in respect of which it is due if it is less than 5% of the total levy. If a carrier withholds an amount which is less than 5% of the total levy due on the disputed invoice, the terminating carrier may suspend termination services within 48 hours of delivery of the Notification of Default as aforesaid;
- (iv) the parties shall exercise reasonable and good faith efforts to resolve disputed volumes and therefore the levy payments are due within twenty five (25) days of commencement of the dispute. If the parties are unable to resolve the dispute within this time, they may, by mutual agreement, choose to extend the dispute resolution period by another seven (7) days. If the parties do not choose to extend the dispute resolution period or at the expiration of the additional seven (7) day period, the dispute shall be referred to binding arbitration. Arbitration shall be governed by the rules of the International Chamber of Commerce.

The purpose of the arbitration shall be to determine the relevant traffic volumes and times and consequently the levy due. The carrier shall pay the levy due based on the outcome of the arbitration within seven (7) days. Failure to make such payment shall entitle the terminating carrier to cease providing termination services to the carrier immediately thereafter.

In the event that a Terminating Carrier suspends termination services to a carrier it shall within three (3) days notify the OUR, the Minister, the Fund administrator, and other Terminating Carriers. The OUR will then commence proceedings under section 14 of the Telecommunications Act, 2000 to determine whether or not there are grounds for a recommendation to the Minister that the licence(s) of the carrier in question should be suspended or revoked. The existence of the Approved Procedure in no way constitutes a waiver of a Terminating Carrier's contractual rights.

6. In the event of non-payment of the Levy, (and in the absence of a dispute under clause 5 above), the following procedure shall apply:

- (a) All Carriers and in particular all Terminating Carriers shall submit to the Ministry of Commerce, Science and Technology (the Ministry) and the OUR a list of

parties currently terminating traffic on the domestic PLMN and/or PSTN networks pursuant to international contracts or interconnection Agreements, as well as evidence of the prevailing billing and payment terms in accordance with interconnection or such other agreements, no later than the 31st day of May, 2005. Thereafter, Terminating Carriers shall update this list as new carriers commence termination of international incoming traffic.

- (b) Within forty-eight (48) hours of the contracted final due date for payment, a Terminating Carrier shall, by virtue of a Notice of Non-payment (the Notice) which shall include traffic reports and other relevant information which validates the amount of the levy, inform the OUR of a carrier's failure to pay the levy. This notice of non-payment shall be copied to the Minister and the defaulting carrier (notice to be served in accordance with the existing contractual provisions).
- (c) Without prejudice to clause 6(e) and 6(f), and particularly in the event of non-compliance with the provisions of those clauses, the Terminating Carrier may suspend International Terminating Services to the defaulting carrier on the expiration of 48 hours after service of the Notice.
- (d) Following receipt of the Notice of non-payment the OUR shall immediately commence investigations in accordance with section 14 (6) and (7) of the Telecommunications Act, 2000 and request that the defaulting carrier shall within twenty-four hours of deemed receipt, give reasons in writing for its failure to pay the levy. The OUR shall review the reasons; if it is not satisfied with the reasons, the OUR shall recommend to the Minister, the immediate suspension or revocation of the Defaulting Carrier's licence;
- (e) Where the Minister accepts the OUR's recommendation for the termination of a Defaulting Carrier's licence the Minister shall serve a Notice of Suspension/Termination of Licence, which shall be copied to the OUR and all Terminating Carriers.
- (f) Terminating Carriers shall forthwith cease the provision of all Incoming International Call termination services to a Defaulting Carrier upon receipt of the Notice of Suspension/Termination of Licence.
- (g) For the avoidance of doubt the failure of a defaulting carrier to give reasons, in writing within the stipulated timeframe shall be grounds for the OUR to recommend to the Minister that a licence be suspended or terminated. Following receipt of the OUR's recommendation if the Minister is satisfied that the levy remains unpaid; he may order the immediate suspension and/or termination of the defaulting carrier's licence.
- (h) Upon receipt of a recommendation from the OUR pursuant to this clause the Minister shall act in accordance with the provisions in clause 6(g) above.
- (i) Terminating Carriers shall include the levy as a separate line item in the invoices issued under their Interconnection Agreements.

7. *Audit and Disclosure:* The Company shall publish interim unaudited accounts on a quarterly basis, in addition to its compliance with the audit and disclosure procedures applicable to public companies.

8. *Pre-Incorporation Agreements:* The matters set out in this Annex shall constitute a valid and enforceable pre-incorporation agreement, which shall be adopted by the first meeting of the Board of Directors of the company.

EXHIBIT 2

May 24, 2005

Ms. Mary Hoberman
Director
International Public Policy
A T & T Wirelsss
16661 NE 72nd Way
RTC 5
Redmond WA 98052
USA

Dear Ms. Hoberman

I refer to your letter of May 19, 2005.

As you are no doubt aware, the Government of Jamaica assumed statutory responsibility for matters relating to Universal Service in 2000, when the liberalization of the telecommunications industry commenced. The incumbent Telecommunications Carrier was appointed the Universal Service Provider for a period of three years, which ended on March 1, 2003.

Since that time, this Ministry and the Office of Utilities Regulation ("OUR") have worked assiduously to conduct the necessary consultations and strategic planning, in order to ensure the efficient, transparent, and non-discriminatory implementation and administration of the national universal service plan.

The Government of Jamaica values greatly the amicable and mutually beneficial trading relationship which exists between our two countries. My recent visit to Washington to discuss matters relating to this very initiative is indicative of the national commitment to resolve differences through dialogue and cooperation. Jamaica's path to growth and development requires the urgent deployment of a national broadband network, which can no longer be delayed, and it is our fervent hope that our trading partners will respect our decisions and work with us to achieve our objectives.

The imposition of the universal service levy represents the exercise of our sovereign right to determine the nature, and funding of our universal service obligations. We are satisfied that the levy is neither discriminatory, nor in breach of our WTO commitments. The liberalization of the telecommunications industry has occurred ahead of our existing WTO commitments, and the only relevant commitment relates to national treatment, which is clearly not an issue as the levy applies to all locally licensed international carriers regardless of nationality.

The harsh reality is that Jamaica has not reaped the rewards of liberalization and the move to cost oriented prices, in one significant regard, namely; the declining settlements failed to stimulate an increase in demand sufficient to provide domestic carriers with the resources to fund reasonable network expansion, and/or universal service obligations.

The following table illustrates the development in the Jamaican telecommunications sector including general market data (number of lines and rates).

Table 1
TELEPHONE SUBSCRIBERS BY CATEGORIES (NUMBER OF LINES)

	2000	2001	2002	2003	2004
Land Lines	493,523	511,302	432,772	450,000	423,000
Mobile	249,842	640,453	1,187,295	1,600,000	1,687,000
Total Lines	743,365	1,150,755	1,620,067	2,050,000*	2,110,000*

Source – Various reports from telecommunications companies

*OUR's Estimates;

Notwithstanding the overall growth in our domestic network, there has been a net reduction in traffic volumes, which supports our contention that the declining settlement rates are not reflected in the retail rates for calls destined for Jamaica. Notably, the most recent data published by the FCC (for the year 2002) shows that international telephone calls averaged US\$ 0.28 per minute. The unofficial information available to us is that the average for 2004 is around US\$0.22. At the same time the data available for Jamaica for 2003 shows average retail charge per minute of US\$0.27. This in the face of declared average settlement rates for Jamaica for that year of US\$0.08. Notably, indications are that settlement rates and the average retail rates to US consumers are no longer moving in sync.

The most recent traffic data posted by the FCC for Jamaica. (see Table 2 below) belies the oft repeated claim that declining rates will lead to higher volumes and increased revenue:

Table 2
US Outbound Traffic to Jamaica

Year	Number of Lines in Jamaica	Outgoing Traffic million minutes	US Carrier Revenue US\$ Mn.	Average Rate per minute US\$	Average minutes per line	Per Line Revenue US\$
2000	739,067	289.3	166.8	0.58	391.41	225.68
2001	1,146,544	373.2	138.7	0.37	325.41	120.97
2002	1,696,521	524.0	168.0	0.32	255.61	81.95
2003	2,050,000	438.9	119.5	0.27	214.09	58.29

(Source: FCC Annual Report 43.61; International Traffic Data 2004)

Historically, international incoming traffic accounted for over 70% of the then monopoly operator's revenues. This was the source of the subsidies for universal service obligations, as well as for funding network expansion and development. The imposition of the levy recognizes that since liberalisation, both revenue and traffic volumes have fallen drastically, resulting in a severe impairment of the industry's ability to attract investment or fund universal service obligations. Additionally, the fact that existing universal service programs continue to be funded by the domestic services/consumers could not be ignored. Domestic telephone services have since 2003 been subject to a higher rate of consumption tax than other goods or services; this additional 5% tax was only recently reduced to 3.5% on May 1, 2005. International incoming telephone services were specifically exempt from taxation until now, which quite ironically brings to an end the discriminatory advantage which that service enjoyed without yielding a commensurate benefit.

The FCC has systematically worked to reverse the outflow of payments to foreign telecommunications administrations, to the complete detriment of these vulnerable administrations which cannot respond with strength to hostile action from large, wealthy corporations with multiple sources of revenue. Domestic operators complain that they are forced to accept foreign contracts which deliberately exclude references to local laws, and seek to deny those operators the right to obey the laws of their country. US carriers persistently refuse to pay increased rates, and hold domestic operators hostage, secure in the knowledge that their limited cash flow cannot sustain them in a prolonged siege.

The increased investment in the deployment of 3 cellular phone networks, and several other domestic data and voice networks, has resulted in increased importation of equipment, software, and professional services from North America. While our revenues decline, we continue to support US manufacturers and equipment vendors at consistently increasing levels.

I appreciate the interest that you have taken in our local industry, and your willingness to participate in a process that is extra-jurisdictional, and therefore cannot bind your companies. I am sure that a way can be found to establish dialogue and cooperation, so that inaccurate information or mistaken perceptions can be corrected. I understand from my representative at the recent meeting in Washington that the opportunity for such dialogue exists, and every effort will be made to ensure that such opportunities are not missed in the future.

The consultation documents and recommendations by the OUR are all published on their website, and the levy itself was the subject of a highly publicised Application for Reconsideration by three domestic network operators. The public – both local and international – has had every opportunity to inform itself on the process, and to participate.

It is our intention to monitor the industry very closely in the coming weeks in order to respond expeditiously to any need for revision, modification, or regulatory intervention. I have assured the carriers, who must now manage the implementation of the order, that they have my unqualified support for any legitimate action that must be taken in compliance with the order. They have specifically expressed concern that bilateral agreements for the exchange of traffic may be interrupted if new rates cannot be agreed with their trading partners. The Ministry will be undertaking a public awareness campaign to ensure that any inconvenience resulting from such interruptions of service will be understood in the proper context, by all Jamaicans.

Please bear in mind that any carrier who fails to comply with the Order is subject to suspension or termination of their licence, and the carriers are required to file reports with the regulator that will enable us to respond expeditiously to allegations of breach or non-compliance. It is therefore likely that carriers who fail to secure rate changes before June 1, 2005 will block the international circuits in order to ensure that their licences are not placed at risk.

Although I am unable to accede to your request on this occasion, I remain willing and available to consider appropriate alternatives that will improve the efficiency, transparency, and proportionate distribution of this unavoidable burden.

Sincerely,



Phillip Paulwell
Minister

EXHIBIT 3



MINISTRY OF COMMERCE, SCIENCE AND TECHNOLOGY
(with **ENERGY**)

PCJ Building, 36 Trafalgar Road, Kingston 10, Jamaica, W.I.
Tel: (876) 929-8990-9 Fax: (876) 960-1623
E-mail: admin@mct.gov.jm Website: <http://www.mct.gov.jm>

June 1, 2005

Miss Camille Facey
Cable and Wireless Jamaica Ltd.
47 Half Way Tree Road
Kingston 10

Dear Miss Facey

I refer to the Ministerial Order which comes into effect today.

As you are all aware, the Government of Jamaica assumed statutory responsibility for matters relating to Universal Service in 2000, when the liberalization of the telecommunications industry commenced. The incumbent Telecommunications Carrier was appointed the Universal Service Provider for a period of three years, which ended on March 1, 2003.

Since that time, this Ministry and the Office of Utilities Regulation ("OUR") have worked assiduously to conduct the necessary consultations and strategic planning, in order to ensure the efficient, transparent, and non-discriminatory implementation and administration of the national universal service plan.

The Government of Jamaica values greatly the amicable and mutually beneficial relationship which exists between the Ministry and all stakeholders in the industry, including our foreign trading partners. My recent consultations with the licensees, and my visit to Washington to discuss matters relating to this very initiative is indicative of the national commitment to resolve differences through dialogue and cooperation. Jamaica's path to growth and development requires the urgent deployment of a national broadband network, which can no longer be delayed, and it is our fervent hope that our trading partners will respect our decisions and work with us to achieve our objectives.

The imposition of the universal service levy represents the exercise of Jamaica's sovereign right to determine the nature, and funding of our universal service obligations. We are satisfied that the levy is neither discriminatory, nor in breach of our WTO commitments. The liberalization of the telecommunications industry has occurred ahead of our existing WTO commitments, and the only relevant commitment relates to national treatment, which is clearly not an issue as the levy applies to all locally licensed international carriers regardless of nationality.

The harsh reality is that Jamaica has not reaped the rewards of liberalization and the move to cost oriented prices, in one significant regard, namely; the declining settlements failed to stimulate an increase in demand sufficient to provide domestic carriers with the resources to fund reasonable network expansion, and/or universal service obligations.

The following table illustrates the development in the Jamaican telecommunications sector including general market data (number of lines and rates).

Table 1
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Notwithstanding the overall growth in our domestic network, there has been a net reduction in traffic volumes, which supports our contention that the declining settlement rates are not reflected in the retail rates for calls destined for Jamaica. Notably, the most recent data published by the FCC (for the year 2002) shows that international telephone calls averaged US\$ 0.28 per minute. The unofficial information available to us is that the average for 2004 is around US\$0.22. At the same time the data available for Jamaica for 2003 shows average retail charge per minute of US\$0.27. This in the face of declared average settlement rates for Jamaica for that year of US\$0.08. Notably, indications are that settlement rates and the average retail rates to US consumers are no longer moving in sync.

The most recent traffic data posted by the FCC for Jamaica. (see Table 2 below) belies the oft repeated claim that declining rates will lead to higher volumes and increased revenue:

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(Source: FCC Annual Report 43.61; International Traffic Data 2004)

Historically, international incoming traffic accounted for over 70% of the then monopoly operator's revenues. This was the source of the subsidies for universal service obligations, as well as for funding network expansion and development. The imposition of the levy recognizes that since liberalisation, both revenue and traffic volumes have fallen drastically, resulting in a severe impairment of the industry's ability to attract investment or fund universal service obligations. Additionally, the fact that existing universal service programs continue to be funded by the domestic services/consumers at a cost far exceeding JA\$1B, could not be ignored. Domestic telephone services have since 2003 been subject to a higher rate of consumption tax than other goods or services; this difference of 5% was only recently reduced to 3.5% on May 1, 2005. International incoming telephone services were specifically exempt from taxation until now, which quite ironically brings to an end the discriminatory advantage which that service enjoyed without yielding a commensurate benefit.

The FCC has systematically worked to reverse the outflow of payments to foreign telecommunications administrations such as ours, to the complete detriment of these vulnerable administrations which cannot respond with strength to hostile action from large, wealthy corporations with multiple sources of revenue. Our three major domestic operators complain that they are forced to accept foreign contracts which deliberately exclude references to local laws, and seek to deny them the right to obey the laws of their country. US carriers persistently refuse to pay increased rates, and hold domestic operators hostage, secure in the knowledge that their limited cash flow cannot sustain them in a prolonged siege.

The increased investment in the deployment of 3 cellular phone networks, and several other domestic data and voice networks, has resulted in increased importation of equipment, software, and professional services from North America. While our revenues decline, we continue to support US manufacturers and equipment vendors at consistently increasing levels.

I appreciate the interest that the U.S. and other foreign Carriers have taken in our local industry, and their willingness to participate in a process that is extra-jurisdictional, and therefore cannot bind their companies. I am sure that a way can be found to establish dialogue and cooperation, so that inaccurate information or mistaken perceptions in the

foreign media can be corrected. I understand from my representative at the recent meeting with those Carriers in Washington that the opportunity for such dialogue exists, and every effort will be made to ensure that such opportunities are not missed in the future.

The consultation documents and recommendations by the OUR are all published on their website, and the levy itself was the subject of a highly publicised Application for Reconsideration by three domestic network operators. The public – both local and international – has had every opportunity to inform itself on the process, and to participate.

It is our intention to monitor the industry very closely in the coming weeks in order to respond expeditiously to any need for regulatory intervention, and to ensure compliance. You, who must now manage the implementation of the order, are assured of my unqualified support for any legitimate action that must be taken in compliance with the order. It has been specifically brought to my attention that bilateral agreements for the exchange of traffic may be interrupted if new rates, sufficient to enable payment of the levy, cannot be agreed with your customers and trading partners. The Ministry will be undertaking a public awareness campaign to ensure that any inconvenience resulting from such interruptions of service will be understood in the proper context, by all Jamaicans.

The public and all interested parties must bear in mind that any carrier who fails to comply with the Order is subject to suspension or termination of their licence, and the carriers are required to file reports with the regulator that will enable us to respond expeditiously to allegations of breach or non-compliance. It is therefore likely that carriers who fail to secure rate changes before June 1, 2005 will be forced to block the international circuits, pending agreement of new rates, in order to ensure that their licences are not placed at risk.

I remain willing and available to consider appropriate alternatives that will improve the efficiency, transparency, and proportionate distribution of this unavoidable burden.

Sincerely,



Phillip Paulwell
Minister